IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 507 Misc.

LEWIS W. HITE,
Petitioner and Appellant Below,

vs.

WESTERN MARYLAND RAILWAY COMPANY,
Respondent and Appellee Below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HILARY W. GANS,
PAUL S. PARSONS,
Counsel for Respondent.

The Daily Record Co., Baltimore 3, Md.

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STATEMENT

"Statement of the Case" (Petition, pp. 4, 5 and 6) correctly summarizes the accident. After the accident the brake was found properly applied and the car stopped at or near the location where Petitioner had been instructed by his foreman to stop it. Examination of the brake apparatus by two experienced car inspectors the following morning disclosed no defects.

ARGUMENT

I.

The First Three Questions Alleged by the Petitioner to be Presented are Purely Hypothetical and are not Raised by the Record in this Case.

Petitioner seeks to persuade this Court that isolated sentences of the Trial Court's charge constitute serious modifications of the Federal Employers' Liability Act and the Safety Appliance Act. His argument is both misleading and disingenuous. For the sake of convenience, we print the entire charge as an appendix to this Brief. Petitioner admits that his instructions which correctly stated the applicable law were granted by the Trial Court, but he places a vast importance on the use of the word "presumption" in that part of the instruction relating to methods of proving a brake defective. He overlooks the qualifying words "may" and "seem" immediately preceding the word "presumption". It is obvious that the word "presumption", as used in the context, was intended to mean an inference only and was so understood. Also, it is apparent that the Trial Court directed the jury to the crux of the case in the concluding sentence which Petitioner in his Petition omitted completely, which stated: "You are to determine the condition as you find it by the weight of the credible evidence at the actual, particular time of the accident."

Further, Petitioner lays great stress on the illustration relating to violation of traffic laws following his instruction on absolute liability. He emphasized the intent element and ignored the fact that the failure of a motorist to obey traffic lights places just as great and absolute a duty on him as the Safety Appliance Act does on railroads in cases of defective appliances. As was said in the case of *Cohen*

v. Evening Star Newspaper Co., 113 F. 2d 523, by the Court of Appeals for the District of Columbia at page 523:

> "A party has no vested interest in any particular form of instruction. This is true, even though the proffered prayer may be unobjectionable in itself, standing alone, as a statement of law. What the language of the instructions shall be is for the trial judge to determine. If, on examination of the entire charge, it appears that the jury has been fairly and adequately instructed, the requirements of the law are satisfied."

The exact contentions made in the Petition were passed upon by the District Court on motion for new trial, and by the Circuit Court of Appeals for the 4th Circuit on appeal. The learned Judges of that Court in the *per curiam* opinion stated (page 2 of the Opinion in Petitioner's Appendix):

> "The plaintiff complains because the judge, after giving the jury certain instructions asked by plaintiff, proceeded to give further instructions which plaintiff contends amounted to a modification of the instructions asked. We have examined the portions of the charge complained of and we do not think that plaintiff has any ground of complaint with respect thereto, but that, on the contrary, the questions in the case were correctly and fairly presented and understandably explained to the jury."

II.

No Conflict as to the Interpretation of Rules 46 and 51 Between the 4th Circuit and Other Circuits is Presented by this Record.

During the course of the trial, at no time was an objection raised by Petitioner and ruled upon by the Trial Court which in any way presented for consideration the objections to the Court's charge of which he now complains. At the conclusion of the evidence, all of the essential prayers submitted by Petitioner were granted after discussion, the Dis-

trict Court advising that they would be incorporated in the charge, but might not be followed verbatim. There was thus no opportunity at any time during the proceeding for the application of Rule 46. At the conclusion of the charge, the District Court asked counsel for both parties whether they had any statement to make regarding the charge. Both answered in the negative. At that stage of the proceeding, Rule 51 applied and the Petitioner, had he had any objections to the Court's charge, was bound to make them known. This he did not do.

If Petitioner's contention were to be followed, trial counsel could in effect lay a trap for the District Court by accepting a charge as given and, when the verdict is unfavorable, present objections to the Appellate Court without giving the District Court the opportunity to correct its errors. This is directly contrary to *Pennsylvania R. Co. v. Minds*, 250 U.S. 368, 375; 63 L. Ed. 1039, wherein this Court said:

> "This Court has repeatedly held that objections to the charge of a trial judge must be specifically made in order that he may be given an opportunity to correct errors and omissions himself before the same are made the basis of error proceedings; this is the only course fair to the court and the parties. (Citations omitted.) Parties may not rest content with the procedure of a trial, saving general exceptions to be made the basis of error proceedings, when they might have had all they were entitled to by the action of the trial court had its attention been seasonably called to the matter."

The cases cited by Petitioner in support of his contention that other Circuits do not follow the ruling of the 4th Circuit in *Sofarelli Bros., Inc. v. Elgin*, 125 F. 2d 758, are all distinguishable. In all but one, the points complained of had been presented to the District Court at some stage in

the trial prior to the charge, and that Court had given an adverse ruling. There was, therefore, no necessity for requesting a modification of the charge, as it was to be expected the District Court would adhere to its original decision.

In *Sweeney v. United Feature Syndicate*, 129 F. 2d 904 (C.C.A. 2nd (1942)), the plaintiff took no formal exception to the refusal of the District Court to grant a prayer. The Circuit Court held this unnecessary and said at page 906:

> "* * * there was full discussion of the point raised which adequately informed the court as to what the plaintiff contended was the law, and the entry of a formal exception after that would have been a mere technicality. Cf. *Stoltz v. United States*, 9 Cir., 99 F. 2d 283, 284. Those cases construing Rule No. 51, F. R. C. P. strictly all involve situations where no indication was given to the judge that error would be assigned to his ruling."

Also, in *Harlem Taxicab Assn. v. Nemesh*, 191 F. 2d 459 (C.C.A., D.C., (1951)), the Circuit Court ruled that the District Court "had repeatedly stated its view of the law in the course of the trial and had repeatedly prevented appellant's counsel from proceeding on the opposite view" (p. 461). To the same effect are the cases of *Keen v. Overseas Tankship Corporation*, 194 F. 2d 515 (C.C.A. 2nd), and *Balchunas v. Palmer*, 151 F. 2nd 842 (C.C.A. 2nd). In *Montgomery v. Virginia Stage Lines*, 191 F. 2d 770, the Court of Appeals for the District of Columbia considered prayers submitted by the plaintiff — when the record did not clearly state. It was held (p. 773) that if the prayers had been submitted after the charge was made, or if they had been previously submitted and were pending and unacted upon when the charge was completed, objection to their denial should be deemed to have been made after the charge, reading Rule 51 with Rule 46.

Relying on *Mondshine v. Short*, 196 F. 2d 606 (C.C.A. 5th (1952)), Petitioner states that the 5th Circuit had apparently left the question open for further consideration. Petitioner overlooks *Atlantic Coast Line R. Co. v. Burkett*, 192 F. 2d 941, in which that Circuit modified its decision, expressly following the ruling of the Court of Appeals for the District of Columbia in the case of *Montgomery v. Virginia Stage Lines, Inc.*, supra.

In *Sofarelli Bros., Inc. v. Elgin*, supra, as in the case at bar, that portion of the charge complained of on appeal had in no way been presented to the District Court during the course of the trial.

Notwithstanding the failure of the Petitioner to make timely objection to the Trial Court's charge in compliance with Rule 51, the Circuit Court of Appeals considered the charge as a whole and stated in its Opinion on page 2:

> "If there had been error in the instructions to the jury which in our opinion had led to a miscarriage of justice, we might notice it under our power to notice plain error not assigned to prevent injustice, but there was no such error. The case was submitted under a fair charge to which counsel not only took no exceptions but with which they were apparently satisfied until the jury decided against them."

CONCLUSION

For the reasons indicated above, it is respectfully submitted that Petitioner's application for a Writ of Certiorari be denied.

HILARY W. GANS,

PAUL S. PARSONS,

Counsel for Respondent.

APPENDIX

CHARGE TO THE JURY

Coleman, Chief Judge:

Members of the Jury, it now becomes my duty to instruct you on the law in this case. You are the sole judges of the facts. Anything that the Court may say with respect to the facts, or any inferences that may have been drawn or may appear to you, none of that is binding upon you. You may pay attention to it or you may reject it in whole or in part, as you may see fit. You are, however, bound by the instructions of the Court as to the law. The Court will not endeavor to review in detail the facts of the case. They must be reasonably clear in your minds, and when you retire to your room for your deliberations, you will access retire to your room for your deliberations, you will have access to all of the exhibits, if you desire to examine them.

The case has not been of any great length, and, therefore, as has just been said, you must have a very clear idea of the testimony. We come, then, to the law of the case.

First, merely by way of introduction, as you have seen here, the case is brought by the plaintiff under two federal statutes. One of them is commonly known as the Federal Employers Liability Act, governing the question of liability of common carriers of interstate commerce to its employees. It was passed by virtue of the power that Congress has over interstate commerce, by express delegation under the Federal Constitution, and its exercise of this power to legislate with respect to the questions and related questions that are before you today.

Then, a supplementary or a complementary federal statute is involved in this case. In fact, it is the one upon which, as you have heard, the plaintiff primarily relies; that is, the statute passed by Congress sometime ago known as the Safety Appliance Act, or the Federal Safety Appliance Act.

Under those acts, in order for an employee to recover from the employer (this railroad), there must be found either negligence on the railroad's part which resulted, in whole or in part, in the employee's injuries, or it must be found that the equipment, some of the equipment with which the employee was required to work, or on which he was required to work, was faulty. In the present case, as you have heard, the specific charge is that the tank car on which the present plaintiff, as brakeman for the Western Maryland Railway, the defendant, was required to ride and to control when it was cut out of freight trains and allowed to drop down by gravity, that is, to roll by its own weight, without any engine power in front or behind it, into a particular yard, where it would be reassembled or connected with some other cars, had a faulty hand brake. The job, in other words, briefly stated, of this brakeman at the time when he had the accident, was to control by hand brake on this tank car its gravity passage down into this yard and place it at the proper point for connection with other cars. So much for the basis and general statement of what the suit is about.

More specifically, I instruct you that where one brings a suit of this kind, the law says that the burden of proving his claim rests upon him. He says that he has been injured. The law says, well, it is up to you, Mr. A, to establish it; the burden of proof rests upon you; you are the moving party.

Then, the next question is how extensive it is, or what is the character of that proof? I instruct you that in order to recover, it is necessary for plaintiff to satisfy you by the weight of the credible evidence, — what you find to be the preponderance of the credible evidence, — that he has sustained his claim as made. In other words, that means that he has satisfied you by the weight of the credible evidence. For example, if you find that it is in even balance, — the evidence which you believe is entitled to credence makes an equipoise, as we sometimes say, the scales are even, they are not either up or down, — then, in this case, they are

not in favor of the plaintiff, the preponderance is not in his favor. Then the plaintiff will not have sustained the burden of proof according to the rule as I have just stated it to you.

I think some, if not all, of you have had some experience even in this term of court in criminal cases, and there, if you will recall, the burden of proof that rests upon the Government, — the prosecuting or moving party in a criminal case, — the burden of proof required of the Government in order to convict an accused person is greater than that which is required of a moving party in a civil case of this kind. You will recall in a criminal case the rule is that the Government must sustain the burden of proof, the burden of proving guilt to the satisfaction of the jury, beyond a reasonable doubt. That is, in a criminal case, in order to convict, the jury must have an abiding conviction of the guilt to a moral certainty.

Here, in a case of this kind, the burden of proof required of the moving party is not so strict. It is, as I have said, simply that the jury shall be satisfied by the weight, the preponderance of the credible evidence as the jury may find it, that the plaintiff has sustained the burden of proving his claim.

Now, then, we will pass more specifically to the law that is applicable to this case. I charge you that the fact that this car, as has been testified to, this tank car, was not owned by the Western Maryland Railway, is not material to the issue involved. It was under its dominion and control at the time, although it belonged to another line, — was simply running over the Western Maryland Railway lines, as we know thousands and thousands of cars do in interchange of traffic tonnage. So that question you need not concern yourselves with.

Next, I instruct you that the happening of this accident, the mere happening of an accident like this, imposes no presumption of liability on the part of the railroad. I instruct you also that the railroad is not the insurer in the present case of the safety of this employee, the plaintiff,

Lewis W. Hite. The burden is upon the plaintiff to establish by the weight of the credible evidence, as I have just explained to you, that a proximate contributing cause of his injuries was an inefficient hand brake, which did not function at the time of the accident in a normal manner; namely, in the way it was designed to function, if it was operated in the way it was intended to be operated; that is to say, with that degree of care required in order that it function in an efficient, normal manner, when in good, normal working order.

If your minds are left, as has been said, by the evidence in a state of even balance as to whether or not plaintiff's injuries were due, in whole or in part, to an inefficient hand brake, then your verdict must be for the defendant railway company.

You will see from what I have just said that you must find, if you do so find, this was an inefficient brake, and I will in a moment define more specifically what we mean by that term "inefficient". Even if you do find that it was inefficient, in order for the plaintiff to recover, that inefficiency or lack of efficiency you must find to have been the proximate cause of the accident, because the law in cases of this kind is based upon a sensible principle and a reasonable ground that a person may be at fault, may be grossly at fault, but that fault may not be the cause, or one of the real causes, of the injury that is complained of. For example, and this is an extreme illustration but it illustrates the point: suppose the plaintiff had fallen off some part of this car due to a heart attack, and then suppose the fact was that the brake was not in operation, so that his fall had nothing to do with the operation of the brake. Suppose, however, it was found that the brake was grossly inefficient and did not function properly. You would have a violation of this Safety Appliance Act in that you would not have the brake in the condition and in the operating state required; but that would have no cause or connection with the brakeman falling off of the car, in the illustration which I have put. You must have a connection between cause and effect

in law in a case of this kind. But I instruct you that if you should find that this hand brake on the tank car was not an efficient hand brake, and its inefficiency a proximate cause of or contributed to the plaintiff's injury, the defendant is absolutely liable. In such case, it is immaterial whether the defendant was careful or not. It is immaterial whether defendant knew or did not know; or had reason to know, or had no reason to know of the inefficiency of the hand brake. In other words, this Safety Appliance Act is a strict act. It is, of course, based upon the intent to make work on railroads, which is dangerous at best, as safe as possible; particularly by requiring that the equipment itself shall be properly operable at all times. Therefore, the law says it is no excuse if you did not know about this thing. It is akin, you might say, to some of our rules on the highways, on the streets. As you have learned in criminal cases, crimes generally, in order to find they have been committed, must have involved an intent to do the illegal thing, but, again, as to traffic regulations, if you could see the red light, it does not absolve you to say you did not intend to go through the red light, or you did not see it was red in place of green.

Here, under the Safety Appliance Act, the United States Government has said that you must have the particular pieces of equipment, the hand brake being one of them, you must have it in a working condition. If you do not, and the lack of it being in that condition is a proximate contributing cause to an employee's injury, then you, the railroad, are liable. Then, what do we mean by "efficient" as used in connection with the statute and the regulations which concern the suit here? I instruct you that by efficient is meant adequate in performance; that is, producing properly a desired result. "Inefficient" therefore means not producing or not capable of producing the desired effect, — "incapable", "incompetent", "inadequate", they all vary. Then, if that is the rule, we next must consider how this inefficiency may be proved. How do you get at it? How do you determine it? I instruct you that it may be shown to be due, first, to some particular defect; or (2) that the mech-

anism failed to function or work efficiently or properly when operated with the care that is natural and normal in the natural, usual, normal intended operation.

I further instruct you that the question, of course, depends upon the condition of the hand brake at the time of this accident, and that, therefore, testimony that this hand brake worked efficiently both before and after the occasion in question, that is the time of the accident, does not of itself prove that it was an efficient brake, because the issue is whether the hand brake operated efficiently at this particular time. The evidence, of course, and you are to consider all of the evidence, — the evidence as to what was found with respect to this brake before the accident and after the accident, may raise some presumption, but it is a rebuttable presumption. You are to determine the condition as you find it by the weight of the credible evidence, at the actual, particular time of the accident.

It follows from what I have just stated that some of the usual defenses in a negligence case are not open to the railroad here. In other words, it is no defense to this suit that there was assumption of risk on the part of the plaintiff when he undertook this employment. Also, it is no defense, as it would be in the ordinary personal injury suit, such as in an automobile accident case, — I think some of you have sat in this or previous sessions in accident cases, — that the plaintiff was himself contributorily negligent. The Federal Safety Appliance Act so provides. So you are not to consider contributory negligence on plaintiff's part in connection with the question of whether the brake was inefficient. If you find that it was, and that its inefficiency was, as I have explained, a proximate contributing cause of plaintiff's injuries, then it is not material, it is not a defense to plaintiff's recovery that he himself may have been contributorily negligent. But, as I have already explained, you are to consider, in determining the question whether the brake was or was not inefficient, whether plaintiff was operating it in a proper manner; namely, in the way it was designed to be operated, so as to function properly and

normally. But this is a different question. Once you find, if you should so find, that the brake was inefficient, it does not matter that the plaintiff was inefficient too because of his negligence.

Members of the jury, that brings me to the last rule of law that the Court is required to give you, and that relates to the measure of damage to be applied, in the event you should find by applying these other rules to the facts as you may find them, that the plaintiff is entitled to recover. This rule I am about to give you is the rule to guide you, the rule you must apply in determining what shall be the amount of the recovery.

What are the factors, what are the elements that you are to consider in determining what amount to allow, in the event that liability does exist on the part of the railroad to this plaintiff, after applying the rules of law which I have just given you?

I now instruct you that the principle which you must apply in measuring and determining damage is as follows: if you find that the plaintiff is entitled to recover damages, such damages are to be determined by including the following: first, compensation for such wages as you find the plaintiff has lost by reason of his injuries; second, compensation for such loss of future earning power as you find he may have suffered; and, third, an amount that will fairly compensate him for such pain and suffering as you may find he has undergone, is undergoing, or probably will undergo in the future, as the result of injuries received from this accident.

I further instruct you that as to his loss of wages and earning power, if you should find he is entitled to recover, he is entitled to the amount which he has lost to the day of trial, and also such an amount, reduced to its present worth, as will compensate him for further loss, which you find he will sustain, of his earning power for such time as you find he would have been employed, at such wages

as you find he would have earned, had it not been for his injuries.

I further instruct you that the present worth of a sum of money payable over a period of years is such an amount given at the present time and invested as will, by the use and expenditure of principal and income thereon in periodic payments of the amount determined, exhaust both principal and income at the end of the period for which it is taken.

Now, members of the jury, I began these instructions by telling you that you are the sole judges of the facts, and that it is not the function, therefore, of the Court to attempt to pass upon the facts. That being true, I shall not detain you now with any review of the facts. As has already been said, they must be fresh and reasonably clear in your minds, that is to say, the testimony and story of this or that witness and of all the witnesses. Indeed, the only purpose at this stage of the instructions for the Court to analyze the facts would be as a possible aid to you in having them correlated. But that does not seem necessary. You have heard the various witnesses. The first question for you to determine is: who is telling the truth? Whom do you believe? Whom do you think is or is not entitled to credence? Who, even though not deliberately falsifying testimony or the truth as he knows it, may, nevertheless, be mistaken as to what happened? You will weigh the motives of the various witnesses. Motive always plays a great part in every case of this kind. Do you believe that the plaintiff is telling the truth, or is this suit, as the defendant's counsel would have you believe, rather in the nature of an afterthought growing out of plaintiff being displeased, disgruntled, or what not, by his failure to get as much employment or as much compensation as he may feel that he was entitled to get?

And similarly as to the extent of the injury, you are to determine the weight of the doctors' testimony. You are not bound to believe any of the testimony that you have heard, if you do not think it is entitled to credence. But

you are to weigh it all, and then with respect to the other branches of the testimony you are to determine, if you should find for the plaintiff, — if you should find that the plaintiff is entitled to recover, — you are to determine what part of the medical testimony is entitled to credence and what part is not; whether this or that doctor is over-estimating or under-estimating deliberately, or if not deliberately, unintenionally, the condition of this man. Do you or do you not find from the weight of the credible testimony that his injury is as serious and as permanent as he and his doctors would have you believe? Do you believe that such injury as he has had, — and it is admitted that he has had injury, and a serious injury, — is, nevertheless getting better and, in any event, is not of the substantial character that he himself and his witnesses would have you believe, or of a permanent character?

Those, members of the jury, are the principles of law that must govern you in your deliberations.